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IN THE

Supreme Court of the United States

October Term, 1967
No. 675

TOWNSHIP OF SPRINGFIELD, DELAWARE COUNTY, PENNSYLVANIA,
Appellant

vs.

IDA MAY GREEN, Owner, and SAMUEL R. GREEN, LESLIE D. GREEN and RUSSELL F. GREEN, Tenants,
Appellees

On Appeal from the Supreme Court of Pennsylvania as of No. 213, Miscellaneous Docket No. 15.

MOTION BY APPELLEES TO DISMISS OR AFFIRM

R. WINFIELD BAILE,
Attorney for Appellees.

Of Counsel:
BAILE, THOMPSON & SHEA,
306 South 69th Street,
Upper Darby, Pennsylvania 19082.

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.
James Patterson, Second & Plum Sts., Media, Pa., Delaware Co. Representative

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I.

MOTION TO DISMISS OR AFFIRM

The appellees, pursuant to Rule 16 of the revised rules of the Supreme Court of the United States, move that this appeal be dismissed or, in the alternative, that the final judgment of the Supreme Court of Pennsylvania in refusing to grant a writ of certiorari in a zoning case be affirmed, for the following reasons:

(a) This appeal does not present a substantial federal question;

(b) The federal question sought to be reviewed has not been timely or properly raised;

(c) The federal question sought to be reviewed has not been expressly passed on;

(d) The judgment of the Supreme Court of Pennsylvania rests on an adequate nonfederal basis;

(e) The Township of Springfield, a municipal corporation which is a political subdivision of the Commonwealth of Pennsylvania, has no right to take this appeal.

II.

OPINIONS BELOW

The recitation of the opinions below as set forth on pages 2 and 3 of the Jurisdictional Statement is correct.

III.

JURISDICTION

The statutory provisions upon which the appeal herein is based are contained in Title 28, United States Code Annotated, Section 1257(2).

IV.

STATUTES INVOLVED

The Jurisdictional Statement (pages 7 to 14 inclusive) states the constitutional provisions and statutes that are involved in this appeal.

V.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Neither Rule 68 1/2 of the Supreme Court of Pennsylvania nor that Court's denial, regardless of the rule, of appellant's petition for certiorari was an abuse of due process.

2. The appellant cannot now raise the question of the constitutionality of Rule 68 1/2.

3. Ordinance No. 786 of Springfield Township, as it relates to the property involved in these proceedings, is repugnant to the Constitution of Pennsylvania and to the Constitution of the United States.

4. The Township of Springfield, a municipal corporation and a political subdivision of the Commonwealth of Pennsylvania, has no standing in this appeal.

VI.

COUNTERSTATEMENT OF THE CASE

On April 21, 1965, Ida May Green leased the vacant property to her sons for a term of five years. She proposed to build a restaurant building with bar facilities on the ground, and the three sons, as a partnership, intended to conduct a restaurant and bar as a business enterprise.

They made application to the Pennsylvania Liquor Control Board for a liquor license, which was granted.

On May 11, 1965, the Greens applied to the building inspector of the Township of Springfield for a use registration permit and for a zoning permit to allow the use of the subject property and the proposed building to be built thereon as a restaurant and cocktail lounge. This application was refused on May 14, 1965.

The Springfield Township Zoning Ordinance, as of that date, provided that, in an E-business district (where the land was located) a building may be erected and a lot may be used for the purpose of a restaurant when authorized as a special exception by the board of adjustment. As of that date, the zoning ordinance had no provision for frontage or area except the provisions providing for side yard, rear yard and setback, and further providing that not more than 60 per cent of the total area shall be occupied by buildings.

The Greens, therefore, on October 28, 1965, appealed to the board of adjustment from the decision of the build-

ing inspector and made application for a special permit and variance to permit the desired use of the subject property.

The board of adjustment fixed a public hearing to be held on November 22, 1965. The hearing was held as scheduled but, upon advice of the Township solicitor, who is counsel for the appellant here, the case was postponed because the solicitor said that the application for a special exception was defective in form.

At a meeting held on December 7, 1965—following the hearing on November 22, 1965—an amendment to the zoning ordinance of Springfield Township was submitted to the board of commissioners. By resolution, they fixed December 28, 1965 as the time of a public hearing thereon and instructed that notice be given as provided in the zoning ordinance.

The hearing was held as advertised, following which the board of commissioners enacted the said amendment on January 18, 1966. It became effective on February 7, 1966.

That amendment provided that not more than 40 per cent of the total area shall be occupied by buildings; that there shall be two side yards, neither of which shall be less than 25 feet; that there shall be a setback of 30 feet; that there shall be a rear yard of not less than 50 feet and that the lot area shall not be less than 50,000 square feet and a lot frontage of not less than 175 feet. It listed restaurants with clubs, fraternity houses or lodges, places of amusement, hospitals or sanitariums or a hotel, and provided that in each such case the lot area shall not be less than 125,000 square feet and the frontage be not less than 250 feet.

Meanwhile, the Greens, following the hearing on November 22, 1965, filed a petition with the board of adjustment in which they appealed from the decision of the building inspector and applied for a special exception, variance and other relief on constitutional grounds.

The board of adjustment held a hearing on the application on January 27, 1966 and on March 4, 1966 entered an order dismissing the appeal and denying the request for special exception and variance or other relief. On April 1, 1966, the appellees appealed to the Court of Common Pleas of Delaware County.

The Greens' restaurant would have a seating capacity of 190 people, and the building itself would cover 6,350 square feet, or approximately 10 per cent of the business zoned area. It would have two side yards, each 47 feet in width, and a rear yard within the business district of 162 feet, with a buffer planting area 15 feet wide in the rear. The building would set back 80 feet from Baltimore Pike. In short, the proposed building more than meets all of the requirements of the new zoning ordinance except lot area and foot frontage.

The appellees agree with the Statement of the Case set forth on pages 16 and 17 of the Jurisdictional Statement, except that the Court of Common Pleas held that the amendment ordinance was unconstitutional *as it applied to the appellees' property.* (Emphasis supplied). (Page 53, Jurisdictional Statement)

VII.

ARGUMENT

1. Neither Rule 68 1/2 of the Supreme Court of Pennsylvania nor That Court's Denial, Regardless of the Rule, of Appellant's Petition for Certiorari Was an Abuse of Due Process

It is true that the Supreme Court of Pennsylvania possesses all of the jurisdiction and powers of the Court of the King's Bench.

All of the Courts of the common law states, as well as the Supreme Court of the United States, can trace the origin of their customs and procedures to the English common law.

The Act of May 22, 1722, 1 Smith Laws 131, 140 Section XIII, 17 P.S. Section 41, granted the Supreme Court of Pennsylvania the power of appellate review. That Act, passed before the American Revolution, also gave that Court the power to hear "all pleas of the Crown."

One hundred and fourteen years later, the Pennsylvania Act of June 16, 1836, P. L. 784, Section 1, 17 P.S. Section 41, provided that "The Supreme Court of this Commonwealth shall have power to hear and determine" any case removed to that Court from any other Court of the Commonwealth "as fully and amply, to all intents and purposes, as the Court has heretofore had power to

do, under the Constitution and laws of this Commonwealth."

When the Constitution of 1874 was written, it provided in Article V, Section 3 that the Supreme Court would have "appellate jurisdiction by appeal, certiorari or writ of error in all cases, *as is now or may hereafter be provided by law.*" (Emphasis supplied).

In 1889 the legislature did provide by law, by the Act of May 9, 1889, P. L. 158, Section 1, 12 P.S., Section 1131, that:

> ". . . all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal or certiorari, shall hereafter be taken in a proceeding to be called an appeal."

This Act did not abolish the writ of certiorari, but rather limited the scope, extent and purpose of the review of certiorari:

> *Re Twenty-First Senatorial District Nomination*, 281 Pa. 273 (1924).

There can be no question that the Supreme Court of Pennsylvania still has the power and right to issue a writ of certiorari. This appellant asserts that it has the duty to do so.

Before Rule 68 1/2 of the Supreme Court of Pennsylvania became effective on April 1, 1964, the question never arose because in all cases where the right of appeal was granted by law, a writ of certiorari issued automatically.

At Common Law, the writ of certiorari was a writ issued by a superior Court of record to an inferior Court

of record or other tribunal or officer, exercising a judicial function requiring the certification and return by the latter of some proceeding then pending, or the record and proceedings in some cause already terminated, where the procedure was not in accordance with the rules of common law. The writ was exercised to make the record "more certain" before the higher tribunal:

> *Drumheller vs. Berks County Local Board No. 1,* 130 F. (2d) 610 (1942).

It must be borne in mind, however, that there is no inherent right of appeal in anyone. It must be granted by statutes, or the Supreme Court in the exercise of its judicial discretion may issue writs of certiorari.

The issuance of that writ is a matter of grace and not of right. It rests with the sound discretion of the Court and cannot be claimed as of right:

> *Drumheller vs. Berks County Local Board,* supra.

This Court has said in *Wade vs. Mayo,* 68 Supreme Court 1270, 334 U.S. 672, 92 L. Ed. 1647 (1948),

> ". . . writs of certiorari are matters of grace. Matters relevant to the exercise of our certiorari discretion frequently result in denial of the writ without any consideration of the merits."

Considering the nature of the writ of certiorari and its history in this country, and in particular the Commonwealth of Pennsylvania, the Supreme Court of that State could say the same thing.

Rule 68 1/2 did not abolish either a right of appeal or broad certiorari as appellant contends.

That rule is operative only when no right of appeal exists by statute or the statute is silent. Where the statute provides, appeal still lies. The rule specifically provides that certiorari shall continue to lie, but limits the issuance of the writ only if it is specifically allowed by the Court or a justice thereof.

In this case, the appellant did file a "Petition for Certiorari." That petition contained a Statement of Facts, Appellant's Contention, a Statement of Authority and a Statement of the Questions Involved (pages 59 to 78 inclusive—Jurisdictional Statement).

It was only after consideration of this petition that the Supreme Court of Pennsylvania denied appellant's request for certiorari.

The appellant also filed a "Petition for Reconsideration of Petition for Certiorari." This petition was also denied (pages 79 to 87 inclusive—Jurisdictional Statement).

By Rule 68 1/2, the Supreme Court of Pennsylvania is merely declaring that it will exercise its discretion. This it always had the legal right to do.

The right of appeal or review is not essential to due process, provided due process has already been accorded in the Court of first instance:

> *State of Ohio ex rel. Bryant vs. Akron Metropolitan Park District*, 281 U.S. 74, 50 Supreme Ct. 228, 74 L. Ed. 710 (1930).

No one has denied that due process was not afforded in the Court of Common Pleas of Delaware County, where a hearing was held before President Judge Henry G.

Sweney. Appellant introduced evidence, including photographs and expert witnesses. The Township of Springfield was represented by competent counsel who examined his own witnesses and cross-examined those of the appellees. Feeling the need to take further testimony, an additional hearing was set before the same judge. It was only after the case was presented on briefs and argued before the court en banc that the appellant was denied its cause.

The mere fact that a matter has been decided adversely does not mean that the appellant has been denied due process of law:

> *Worcester County Trust Company vs. Riley*, 302 U.S. 292, 58 Supreme Ct. 185; 82 L. Ed. 268 (1937).

The appellant has confused "the familiar with the necessary" when it alleges that the refusal of the Supreme Court of Pennsylvania to issue the writ of certiorari was a denial of due process.

2. The Appellant Is Estopped From Raising the Question of the Constitutionality of Rule 68 1/2 Because the Question Was Not Timely nor Properly Raised

Rule 68 1/2 provides ". . . in all such cases the Appellant sha" file *within 30 days* from the date of the decision sought to be reviewed a Petition for a special writ of certiorari." (Emphasis supplied).

That rule does not provide any procedure or provision for reconsideration of a petition once the original one was filed within 30 days and acted upon.

The decision of the Court of Common Pleas of Delaware County was made on February 7, 1967 and amended February 23, 1967.

The appellant did not raise the question of abuse of due process until after June 12, 1967—more than 30 days after the decision of the lower court.

This was not the proper time to raise that question.

The necessity for demanding that a constitutional issue be timely raised is obvious. Without it, a petitioner would be able to avail himself of any process and, upon being unsuccessful, contend that the process is unconstitutional. This would unnecessarily delay all proceedings, which is precisely what has happened in this case.

It has been almost two and one-half years since appellees' application for a permit to construct their restaurant was filed.

3. Ordinance No. 786 of Springfield Township, as It Relates to the Subject Property, Is Repugnant to the Constitution of Pennsylvania and the Constitution of the United States

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This question has been passed upon by the Court of Common Pleas of Delaware County, Pennsylvania, and by the Supreme Court of the State of Pennsylvania.

It is not necessary to argue the merits of this case here.

It is sufficient to say that evidence of sufficient strength was presented to the learned hearing judge to persuade him that the restrictions imposed upon the subject property by the ordinance were unreasonable, harsh, discriminatory and confiscatory. They had no substantial relation to the public health, safety, morals or general welfare of the Township of Springfield or to the area immediately surrounding the subject property:

> *Village of Euclid, Ohio vs. Amber Realty Company,* 47 Supreme Ct. 114, 272 U.S. 365 (1926).

The answers filed by the Greens to the petition for a writ of certiorari and the petition for reconsideration ably demonstrate this.

4. The Township of Springfield, a Municipal Corporation and a Political Subdivision of the Commonwealth of Pennsylvania, Has No Standing in This Appeal

Both the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States refer to "persons."

This Court has said in *State of South Carolina, Plaintiff vs. Nicholas DeB. Katzenbach, Attorney General of the United States*, 383 U.S. 301, 86 Supreme Ct. 803 (1966):

> "... the word 'person' in the context of the due process clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the states of the Union, and to our knowledge this has never been done by any court."

What applies to the Fifth Amendment can be applied with equal force to the clause of the Fourteenth Amendment, which states:

> "... nor shall any *state* deprive any *person* of life, liberty or property, without due process of law." (Emphasis supplied).

The word "person" as used in that Amendment does not include a state of the Union and, of course, would not include a political subdivision of that state.

The Township of Springfield, by the decision of the Common Pleas Court of Delaware County, by the decision of the Supreme Court of Pennsylvania in refusing a writ of certiorari under Rule 68 1/2 has not and cannot be deprived of any property without due process of law.

The Supreme Court of Louisiana held:

"... it is plain that the Fourteenth Amendment of the Federal Constitution, declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws, is utterly without application to the political subdivision of a state which cannot be viewed as a person within the purview of the constitutional provision ..."

Warren County, Mississippi vs. Hester, 219 La. 763, 54 So. 2nd 12 (1951).

VIII.
CONCLUSION

Showing the foregoing, it is respectfully submitted that the appellant has presented no substantial questions for the decision of this Court and that, therefore, this appeal should be dismissed or, in the alternative, the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted:
R. WINFIELD BAILE,
Attorney for Appellees.